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State v. Berber Appellant's Brief 1 Dckt. 40421

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JUAN RAMON BERBER, Defendant-Appellant.	)	NO. 40421 CANYON COUNTY NO. CR 2011-16748 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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STATEMENT OF THE CASE

Nature of the Case

Juan Ramon Berber appeals from the judgment of conviction for lewd conduct. On appeal, he asserts that the district court erred when, over his objection, it admitted other bad act evidence, and even assuming the evidence was somehow marginally relevant, the district court abused its discretion when it refused to conduct the requisite balancing test prior to admitting the evidence.

Statement of the Facts and Course of Proceedings

Juan Ramon Berber was charged, by amended indictment, with lewd conduct alleged to have been committed against then-thirteen year old N.M. by way of genital-to-genital or manual-to-genital contact. (R., pp.106-07.) According to the State, the incident was believed to have occurred on December 31, 2008. (Tr., p.51, Ls.12-16.) The State sought to present 404(b) evidence consisting entirely of conduct that occurred *after* the incident for which Mr. Berber was charged. In describing the 404(b) evidence, the State explained, "there's all these other instances where she [N.M.] talks about, you know, it continued to happen. And so we intend to introduce those." (Tr., p.51, Ls.16-20.) That conduct included "genital-to-genital contact, genital-to-anal contact, oral-to-genital contact, and manual-to-genital contact" that occurred both in Idaho and California, all of which occurred *after* the incident for which Mr. Berber was being prosecuted. (Tr., p.52, L.15 – p.55, L.19.)

Defense counsel objected to the 404(b) evidence, explaining that he didn't understand how it could be admissible without "a proper showing of how it's admissible or relevant to the actual charge." (Tr., p.214, Ls.1-21.) Ultimately, the district court

ruled that the 404(b) evidence could come in because of "the fact that – that there are other – issues other than propensity that could – that relate to this, I'm going to permit it." (Tr., p.225, L.24 – p.226, L.4.) In discussing the balancing test that is required under Rule 403, the district court explained that it need not conduct such a test in this case "because it's – it's the same individuals." (Tr., p.226, Ls.5-13.)

Throughout the trial, the State made it clear that the incident for which Mr. Berber was being prosecuted was for the first incident of alleged conduct, which it believed occurred on New Year's Eve of 2008. (Tr., p.51, Ls.12-17, p.53, Ls.5-12, p.244, Ls.19-23 ("But there is going to be one consistent thing that she's always talked about, and that's the defendant put his penis inside her vagina, that it hurt, that afterwards when she went to the bathroom, it hurt again."), Tr., p.609, Ls.9-19.) This can best be seen when examining the following portion of the State's rebuttal closing argument:

> [Y]ou don't have to find that it happened on a specific date. But I submit to you that memory of New Year's, the party she talked about, falling asleep on the couch, that there were other people there, that that's consistent with New Year's. People have people over. There is a party. People stay up late. People drink.
>
> You do have to agree on the act. And you have an option. You have either manual-to-genital contact[1] or genital-to-genital contact. It does not have to be both. You've heard that there was genital-to-genital contact. And I submit to you that that's the count, the portion of this that you find the defendant guilty of. *That he put his penis inside her vagina on or*

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[1] The record is devoid of any testimony by N.M. that there was any manual-to-genital contact. (Tr., p.325, L.25 – p.327, L.11 (describing the New Year's Eve genital-to-genital contact for which Mr. Berber was charged), p.330, Ls.2-20 (testifying that genital-to-genital contact continued to occur bi-weekly), p.330, L.21 – p.338, L.9 (describing oral-to-genital contact on one occasion while driving from Idaho to California), p.338, L.10 – p.340, L.5 (bi-weekly genital-to-genital contact while in California), p.340, L.6 – p.344, L.1 (one incident of genital-to-anal contact), p.344, L.10 – p.346, L.25 (describing another incident of oral-to-genital contact in Idaho), p.375, Ls.17-18 (denying any contact between Mr. Berber's penis and N.M.'s hand), p.378, Ls.4-6 (same), p.383, Ls.18-19 (same), p.394, Ls.14-23 (describing the two incidents of oral-to-genital contact).)

about New Year's Eve after he'd gained her trust. Moved in with her and had her completely away from her father.

(Tr., p.620, L.20 – p.621, L.10 (emphasis added).)

Following a jury trial at which other bad act testimony concerning a wide range of alleged sexual misconduct, including oral, anal, and vaginal sex occurring in at least two states over the course of nearly a year, Mr. Berber was found guilty of lewd conduct for the incident alleged to have occurred on December 31, 2008. (Tr., p.637, Ls.5-14.)

Mr. Berber filed a timely Notice of Appeal. (R., p.212.)

ISSUE

Did the district court err when it permitted the presentation of irrelevant propensity evidence in violation of Rule 404(b), and abuse its discretion when it admitted the other bad acts evidence without conducting the requisite balancing test?

ARGUMENT

The District Court Erred When It Permitted The Presentation Of Irrelevant Propensity Evidence In Violation Of Rule 404(b), And Abused Its Discretion When It Admitted The Other Bad Acts Evidence Without Conducting The Requisite Balancing Test

A. Introduction

The State sought to present 404(b) evidence of conduct that occurred after the incident for which Mr. Berber was charged. In describing the evidence, the State explained that Mr. Berber was being prosecuted for an incident that occurred on December 31, 2008. (Tr., p.51, Ls.12-16.) In describing the 404(b) evidence, the State explained, "there's all these other instances where she [the victim] talks about, you know, it continued to happen. And so we intend to introduce those." (Tr., p.51, Ls.16-20.) That conduct included "genital-to-genital contact, genital-to-anal contact, oral-to-genital contact, and manual-to-genital contact" that occurred both in Idaho and California, all of which occurred after the incident for which Mr. Berber was being prosecuted. (Tr., p.52, L.15 – p.55, L.19.)

Defense counsel objected to the 404(b) evidence, explaining that he didn't understand how it could be admitted without "a proper showing of how it's admissible or relevant to the actual charge." (Tr., p.214, Ls.1-21.) Ultimately, the district court ruled that the 404(b) evidence was admissible because of "the fact that – that there are other – issues other than propensity that could – that relate to this, I'm going to permit it." (Tr., p.225, L.24 – p.226, L.4.) In discussing the requisite balancing test of the probative versus prejudicial value of the evidence, the district court explained that it need not conduct such a test "because it's – it's the same individuals." (Tr., p.226, Ls.5-13.)

Mr. Berber asserts that the district court erred when, over his objection, it concluded that other bad acts evidence was not propensity evidence and was relevant

under Rule 404(b). Additionally, even assuming such evidence was somehow minimally relevant, the district court abused its discretion when it admitted the evidence after refusing to conduct the requisite balancing test.

B. Standards Of Review

1. 404(b) Determination

When reviewing a district court's decision to admit other bad acts evidence under Idaho Rule of Evidence 404(b), appellate courts review the relevancy determination *de novo*. *See State v. Rossignol*, 147 Idaho 818, 824 (Ct. App. 2009). Review of the district court's balancing of the probative versus prejudicial value of the evidence is for an abuse of discretion. *State v. Grist*, 147 Idaho 49, 52 (2009).

2. Abuse Of Discretion

When a district court's discretionary decision is reviewed on appeal, the appellate court conducts a three part inquiry to determine whether that discretion was abused. First, the district court must have perceived the issue as one of discretion. Second, the district court must have acted within the outer boundaries of such discretion and consistently with any applicable legal standards. Third, the district court must have reached its decision in an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989).

C. The District Court Erred Because The Evidence Was Irrelevant Propensity Evidence

Idaho Rule of Evidence 404(b), in relevant part, provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as

> proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

I.R.E. 404(b).

Mr. Berber asserts that none of the exceptions in Rule 404(b) apply to render the other bad act evidence relevant and admissible in his case. As such, the district court committed legal error in determining that the other bad act evidence was relevant.

In *Grist*, the Idaho Supreme Court clarified that there is no special exception to Rule 404(b)'s exclusion of character and propensity evidence for child sex abuse cases, holding instead that the same considerations apply regardless of the type of crime or the status of the alleged victim. *Grist*, 147 Idaho at 55.

First, it is worth disposing of the exceptions that cannot possibly apply in this case. Identity is not at issue in this case; either Mr. Berber committed the act for which he was charged or he did not. Any motive Mr. Berber may have had was not at issue in this case. The only motive that could have been at issue would be whether the charged act was done for the purpose of gratifying the sexual desires of either Mr. Berber or N.M., and Mr. Berber's defense was that he did not commit the charged act, not that he committed the charged act without sexual motivation. (*See* Tr., p.556, L.4 – p.557, L.4.) That leaves opportunity, intent, preparation, knowledge, and absence of mistake or accident as potentially applying. For the reasons set forth below, the other bad act evidence was not relevant under any of these remaining exceptions.

1. Corroboration By Common Scheme Or Plan

In *State v. Joy*, __ Idaho __, 304 P.3d 276, 284 (2013), the Idaho Supreme Court considered the trial court's decision to admit evidence of other bad acts of sexual and physical violence alleged to have been committed by the defendant against his wife in a

trial for an incident of abuse that purportedly occurred several months later. In discussing the corroboration by common scheme or plan exception,[2] the Court explained,

> [T]o be admissible under Rule 404(b), evidence of prior misconduct must show more than a superficial similarity to the nature and details of the charged conduct, but must instead show that the defendant's charged and uncharged conduct is linked in a way that permits the inference that the prior conduct was planned as part of a course of conduct leading up to the charged offense.

Joy, __ Idaho at __, 304 P.3d at 285.

In *Grist*, the Idaho Supreme Court explained that, when considering whether to admit other bad acts evidence "for purposes of 'corroboration' as demonstrating a 'common scheme or plan,'" the trial court "must carefully scrutinize the evidence" sought to be presented "in order to determine whether such evidence actually serves the articulated purpose or whether such evidence is merely propensity evidence served up under a different name." *Grist*, 147 Idaho at 55.

In light of the fact that the other bad act evidence in Mr. Berber's trial occurred *after* the conduct for which he is charged, it is impossible for the *subsequent* bad acts to have been part of a common scheme or plan to commit the *charged* act. Additionally, the district court did not, as required under *Grist*, subject any of the evidence to "careful[] scrutiny" to determine whether it actually served the articulated purpose as opposed to representing merely propensity evidence.

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[2] The Idaho Supreme Court has explained that the exceptions for preparation, plan, knowledge, and identity "are most frequently grouped together under the rubric of 'common scheme or plan.'" *Grist*, 147 Idaho at 54.

2. Opportunity

With respect to the opportunity exception, it is unclear how evidence concerning *subsequent* alleged assaults was relevant to show an opportunity to commit the charged act. Neither the State nor the district court articulated how such evidence was relevant to the opportunity exception. Additionally, the details of the other alleged assaults were either absent or markedly different from those underlying the charged conduct.

Specifically, while N.M. acknowledged that genital-to-genital contact continued to occur bi-weekly after the first alleged incident, she did not provide specifics as to where or how the conduct was accomplished (i.e., whether it occurred in the same place (her bedroom with her brother present) or under similar circumstances (while her mother was at home but in another part of the house)). (Tr., p.330, Ls.2-20.) With respect to the genital-to-genital contact that purportedly occurred in California, N.M. testified that it occurred while she was alone in a shared bedroom, without any of her siblings present, unlike the charged conduct. (Tr., p.338, L.12 – p.339, L.8.)

Finally, with respect to N.M.'s testimony concerning an incident of anal sex in California and two incidents of oral-to-genital contact, it is unclear how such incidents, especially in light of the fact that one of the oral-to-genital incidents purportedly occurred while Mr. Berber was driving a truck to California, would be relevant to show an opportunity to have committed the charged genital-to-genital conduct months earlier in the bedroom of a house in Idaho. In light of the fact that none of the other bad acts evidence was relevant to the issue of opportunity to commit the charged conduct, this could not have served as a basis for finding the evidence relevant.

Furthermore, even assuming the other alleged incidents of genital-to-genital contact in both Idaho and California were relevant for this purpose, the incident of anal sex in California and the testimony concerning oral-to-genital sex during which Mr. Berber, while driving, purportedly ejaculated into N.M.'s mouth was not relevant for this purpose.

3. Absence Of Mistake Or Accident

With respect to the absence of mistake or accident exception, it is important to note that Mr. Berber never presented as a defense that he committed the act underlying the charged conduct but did so only accidentally or that N.M. mistook his intent in engaging in the charged conduct. As such, it was not proper to conclude that the other bad act evidence was relevant to show an absence of mistake or accident. This case is different from the situation presented in *State v. Cardell*, 132 Idaho 217 (1998), in which the Idaho Supreme Court considered whether testimony about a masseur's improper touching of several of his adult clients was properly admitted to rebut the defendant's testimony that his touching of the genitals and breasts of a sixteen year old female client was either accidental (with respect to the genital contact) or done for therapeutic purposes (with respect to the breast contact). *Cardell*, 132 Idaho at 219-20. Unlike the situation in *Cardell*, Mr. Berber categorically denied *any* manual-to-genital or genital-to-genital contact, and did not rely upon a claim of mistake or accident. (*See* Tr., p.556, L.4 – p.557, L.4.)

Furthermore, even assuming that allegations of subsequent incidents of genital-to-genital contact were somehow relevant to show an absence of mistake or accident in the charged conduct, there is no logic under which testimony concerning the incidents of anal and oral sex could be relevant for such a purpose.

4. Intent

With respect to the intent exception, it is worth noting that in *State v. Roach*, 109 Idaho 973 (Ct. App. 1985), the Idaho Court of Appeals explained that the intent exception cannot always apply in cases, otherwise other bad act evidence would nearly always be relevant under the exception. *Roach*, 109 Idaho at 975. In *Roach*, the Court of Appeals held that other bad acts were not relevant under the intent exception because the defendant, charged with lewd conduct, had specifically denied committing the acts and made no claim that he had done so only innocently. *Id.* Mr. Berber's testimony was similar to that of the defendant in *Roach*: he denied committing the acts at all. Because intent was not an issue in Mr. Berber's case, the other bad acts evidence was not relevant under Rule 404(b).

Because the other bad acts evidence was not relevant under any of the exceptions set forth in Rule 404(b), the district court committed legal error in admitting the evidence. Mr. Berber objected to the admission of the evidence, and as such, in order to avoid reversal, the State must establish beyond a reasonable doubt that the testimony concerning months of additional alleged abuse, including anal and oral sex, did not play any role in the jury's decision as to the one charged incident of genital-to-genital contact. Because the State will be unable to meet this burden, Mr. Berber respectfully requests that this Court vacate his conviction, and remand this matter for a new trial at which irrelevant propensity evidence is not presented.

D. The District Court Abused Its Discretion When It Refused To Conduct The Requisite Balancing Test

In the alternative to his argument that the other bad acts evidence was irrelevant, Mr. Berber maintains that, even assuming the other bad act evidence was somehow

marginally relevant under 404(b), the district court abused its discretion when it affirmatively refused to conduct the requisite balancing test under Rule 403 as to whether the relevance of the other bad acts evidence was substantially outweighed by the danger of unfair prejudice. Specifically, the district court reasoned,

> And the third prong that I've – that I'm going to make reference to, although I've impliedly done so, is where the probative value is substantially outweighed by the danger of unfair prejudice. *And that is not a factor here, because it's – it's the same individuals.* And I think the testimony is going to be something that either is given – I mean, either the jury will find that credible or they won't find it credible. So that's my ruling.

(Tr., p.226, Ls.5-13 (emphasis added).)

Idaho Rule of Evidence 403, in relevant part, provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." I.R.E. 403. With respect to Rule 403's balancing test, the Idaho Supreme Court has explained, "Only after using this balancing test, may a trial judge use his discretion to properly admit or exclude the proffered evidence." *Davidson v. Beco Corp.*, 114 Idaho 107, 110 (1987).

Nothing in the text of Rule 403 indicates an exception for conduct involving the same parties, and Mr. Berber is unaware of any case law that establishes such an exception. In fact, Idaho case law suggests otherwise. *See Joy*, __ Idaho at __, 304 P.3d at 284 (2013) (setting forth 404(b) analysis, including application of Rule 403's balancing test, before discussing admission of prior bad act alleged to have been committed by defendant against the same victim);[3] *see also State v. Coleman*, 152 Idaho 872, 878 n.1 (Ct. App. 2012) (noting that it need not consider the district court's Rule 403 analysis because it found the evidence to be irrelevant under 404(b)) (citation

[3] The Idaho Supreme Court never considered the district court's Rule 403 analysis because it found that the evidence was not relevant under any of the exceptions to Rule 404(b). *Joy*, __ Idaho at __, 304 P.3d at 284-86.

omitted). Additionally, the Arizona Court of Appeals has held that the balancing test required under Arizona's similar rule must be conducted even when the other bad acts evidence involves the same victim. *See State v. Garcia*, 28 P.3d 327 (Ariz. Ct. App. 2001).

Because the district court did not act within the outer boundaries of its discretion and consistently with the applicable legal standards, it abused its discretion when it affirmatively refused to conduct the requisite balancing test before admitting the other bad acts evidence. Furthermore, even if the district court had conducted the requisite balancing test, it would have abused its discretion in admitting the other bad acts evidence in light of the minimal, if any, relevance[4] that the evidence had and the substantial prejudice that its admission had.[5] As such, assuming this Court rejects Mr. Berber's argument that the evidence was irrelevant propensity evidence, it should nevertheless vacate the conviction and remand this matter for a new trial at which such overwhelmingly prejudicial evidence is not admitted.

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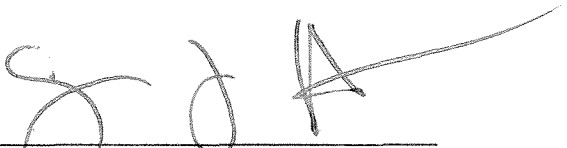
[4] Mr. Berber maintains that the evidence was irrelevant propensity evidence. He argues only that the evidence had minimal relevance in the alternative to the claim advanced in his primary argument.

[5] This claim is even stronger with respect to the evidence concerning allegations of anal and oral sex, as well as the allegations of conduct that purportedly occurred outside of Idaho.

CONCLUSION

For the reasons set forth herein, Mr. Berber respectfully requests that this Court vacate the judgment of conviction, and remand this matter for a new trial at which the other bad acts evidence is not admitted.

DATED this 10th day of September, 2013.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of September, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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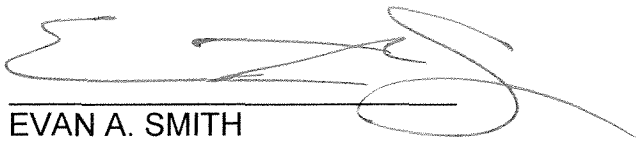

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